United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

2-22-77

76-7541

United States Court of Appeals

FOR THE SECOND CIRCUIT

DANIEL E. RYAN, Admr. of the Estate of Marvin George Ellsworth Mousseau,
Plaintiff,
vs.
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC., VERMONT CONSTRUCTION COMPANY, INC., and GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,
vs.
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

Civil Action No. 73-240.

ALVIN E. MARTIN,
Plaintiff,
vs.
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC., VERMONT CONSTRUCTION COMPANY, INC., and GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,
vs.
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

Civil Action No. 74-99.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT IN CIVIL ACTIONS NO. 73-240 AND 74-99.

BRIEF FOR DEFENDANT-APPELLANT

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IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 76-7541

DANIEL E. RYAN, Admr. of the Estate of
Marvin George Ellsworth Mousseau,

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Plaintiff-Appellant,

vs.

JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,

Defendant.

Civil Action No. 74-99

Statement of the Case

This case arose out of an accident during the construction of a hospital in St. Johnsbury, Vermont. The plaintiffs were

employees of a subcontractor working on the hospital at the time of the accident (T-95).

The defendant, Vermont Construction Company, Inc. (hereinafter referred to as Vermont Construction), undertook to construct the Northeast Vermont Regional Hospital, Inc. in St. Johnsbury, Vermont pursuant to a written agreement dated March 16, 1970 (Exhibit 22).

The general conditions of that contract contained the following pertinent provisions.

1. The safeguards provided for in the Manual of Accident Prevention were to be followed by the general contractor.

2. The general conditions permitted the general contractor to subcontract the work.

3. The contractor was responsible for coordinating the work of all of the subcontractors (20C).

4. The contractor had the power to terminate the work of any subcontractor (21F).

THE CONTRACT BETWEEN VERMONT CONSTRUCTION AND JOHNSON INDUSTRIAL PAINTING CONTRACTORS.

Vermont Construction subcontracted with Johnson Industrial Painting Contractors (hereinafter referred to as Johnson), to do all the painting and prefinishing of the masonry required under the written contract with the owner. Vermont Construction and Johnson entered into a written agreement dated April 10, 1970. By the terms of the agreement, Johnson was to supply all of its own equipment, labor and materials (See Contract). The agreement further required that Johnson perform all of its work under the superintendence of a

qualified foreman (Article II). All of the general conditions of the contract between Vermont Construction and the owner were incorporated into the contract between Johnson and Vermont Construction (Article I). The contract also contained the following indemnity provision in Article XVI:

> "The subcontractor expressly undertakes to pay all the damages that could be caused to the contractor as a result of defects in his work or as a result of his default to terminate according to the schedules in that portion of the work mentioned in the contract between the contractor and the owner. These damages might be direct or indirect; they might result from the law in general or from the special conditions of the contract between the contractor and the owner".

Johnson was required to follow the schedules established by Vermont Construction (Article III).

The undisputed evidence was that Johnson had breached its contract with Vermont Construction in the following particulars:

1. Safeguards provided for in the Manual of Accident Prevention were not followed by Johnson in rigging the scaffold from which the workmen fell.

2. Johnson's foreman was not on the premises during the time that the scaffold was rigged and put into use (T-490).

3. The scaffold was not tested in accordance with the provisions specified in the Manual of Accident Prevention (T-490).

Johnson was a sizable painting contracting firm having one hundred employees (T-191), with about ten permanent scaffolding crews working at one time (T-156), in both Vermont and New York (T-157).

ACCIDENT

The plaintiffs, Alvin E. Martin and Marvin George Mousseau, were employees of Johnson at the time of the accident (T-95). Both plaintiffs were painters who were accustomed to scaffold work (T-95). Mousseau had worked for Johnson for several years prior to the accident as a foreman, receiving foreman's pay and had responsibility for equipment (T-268, 269) Martin had worked for about five years for Johnson doing high scaffolding work (T-95, 123, 147). Scaffolding was dangerous work and the men received extra pay for it (T-198-199). No scaffolding work was done before the accident (T-168) on the St. Johnsbury site. The men originally rigged a cable supported scaffold but changed it for one supported by ropes immediately prior to the accident (T-124, 125). The plaintiff rigged safety lines to independent points of suspension on the roof of the hospital (T-192), raised the scaffold to maximum height of 40 feet above the ground, did not attach their safety lines while they were raising the scaffold, and, as it reached a point approximately 40 feet above the ground, the rope supporting one side of the scaffolding gave way causing Marvin George Mousseau to fall to his death. Alvin E. Martin managed to hang on to the other ropes and tried to let himself down. Eventually the remaining ropes broke and Alvin Martin was injured in his fall. Martin testified that the usual practice was to tie the safety lines to an independent point of suspension so that the scaffolding and the safety lines were not suspended from the same object (T-192). Two safety lines were attached to independent points of suspension on the roof, but the plaintiffs did not secure them to their bodies. Martin testified that he didn't secure the safety line to his body because it was inconvenient (T-149). He also testified that it was his practice to just hang on to the safety line with one hand while working on scaffolding (T-224, 225).

Both plaintiffs received Workmen's Compensation benefits from Johnson (T-225, 226). The plaintiffs brought suit in the Federal District Court of Vermont against Vermont Construction, the rope manufacturer, and the retailer of the rope to recover damages sustained as a result of the accident. Vermont Construction brought a third-party action against Johnson but this was dismissed by the trial court by its Order dated September 17, 1974.

The case was tried before Chief Judge Holden. During the trial, Vermont Construction moved for a directed verdict on the grounds that Vermont Construction was an employer of the plaintiff within the meaning of 21 V.S.A. § 601 (3), a section in the Workmen's Compensation Act, and therefore immune from suit, that the plaintiffs had assumed the risk of injury as a matter of law, and that it did not owe a duty to the defendants to provide a safe scaffold. The court denied the motion.

The jury returned a verdict for the Estate of Marvin Mousseau against Vermont Construction in the amount of $189,800.00 and in favor of Martin against Vermont Construction Company in the amount of $32,500.00.

After the trial, the defendant Vermont Construction filed a motion for a new trial and/or judgment notwithstanding the verdict on the same grounds that it requested a directed verdict. Vermont Construction also requested Judge Holden to reduce the judgment by the amount of Workmen's Compensation received by the plaintiffs. Finally Vermont Construction moved that the court vacate its order dismissing the third-party action which Vermont Construction had brought against Johnson. Judge Holden denied all of the Vermont Construction's post trial motions.

Issues

I

Is a general contractor, as an employer within the meaning of 21 V.S.A. § 601 (3), liable for Workmen's Compensation to the employees of the subcontractor and therefore immune from common law liability under 21 V.S.A. § 622?

II

If a general contractor has certain duties to the employees of the subcontractor and has made a contract with the subcontractor to perform those duties and if the subcontractor performs his duties negligently so as to make the general contractor liable in damages to these employees, is the general contractor entitled to restitution from the subcontractor for these damages?

III

Do employees who work from a scaffold without using safety lines, knowing this practice is dangerous, assume the risk of injury as a matter of law?

IV

Does a general contractor owe a duty to the employees of his subcontractor to supervise the subcontractor when the subcontractor erects a scaffold?

V

If both the general contractor and the subcontractor are negligent, is the general contractor entitled to a *pro tanto* reduction of the judgment entered against him in favor of the employees of the subcontractor in the amount of Workmen's Compensation paid by the subcontractor to his employees?

ARGUMENT

I

Because Vermont Construction is primarily liable under the law of Vermont for Workmen's Compensation awards to Johnson employees and because the remedy under the Workmen's Compensation Law is exclusive, Vermont Construction is immune from common law liability to the plaintiffs.

(A) The Workmen's Compensation law of Vermont, rather than the Workmen's Compensation law of New York determines the rights and remedies of the plaintiffs in this action.

Johnson is a New York corporation and the plaintiffs were employed in New York. The accident occurred in Vermont. The plaintiffs collected Workmen's Compensation pursuant to New York law. In Vermont, the rights and liabilities of parties to a tort action are determined by the law of the state where the tort occurred. *Goldman vs. Beaudry,* 122 Vt. 299 (1961), and it is well settled that when the accident occurs in Vermont, the workman is entitled to benefits under Vermont's Workmen's Compensation law even though he was hired in New York. *Martin vs. Furman Lumber Company,* 134 Vt. 1 (1975). Therefore, Vermont Workmen's Compensation law determines the rights of the parties in this action.

(B) Vermont Construction is liable for Workmen's Compensation to the plaintiffs as an employer within the meaning of 21 V.S.A. § 601 (3).

The Workmen's Compensation Act of Vermont, 21 V.S.A. § 601 *et seq.* provides the following definition of an employer:

> "Employer includes any body of persons, corporate or unincorporated, public or private, and a legal representative of the deceased employer and includes the owner of lessee of the premises or *other persons who is virtually the proprietor or operator of the business there carried on but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed.*" 21 V.S.A. §601 (3) [emphasis supplied]

Vermont Construction was the proprietor of the business carried on at the Northeastern Hospital and comes within this definition of an employer. In *O'Boyle vs. Parker-Young Company*, 95 Vt. 58, 112 A. 385 (1920), the Parker-Young Company manufactured boards and owned some lumber located on a farm. It contracted with Joy to haul this lumber. An employee of Joy was injured while hauling the lumber. In a suit to collect Workmen's Compensation from Parker-Young Company, the court held that the defendant was the proprietor of the business of hauling lumber within the meaning of the Act because the hauling of lumber pertained to its business of manufacturing lumber.

The painting of the hospital was also part of the general contractor's business of constructing the hospital. Vermont Construction was in the business of assuming the broad obligations of a principal contractor and in the business of letting out portions of this undertaking to others to perform on its behalf, Vermont Construction had an obligation to the owner of the hospital to paint the building. It chose to delegate this aspect of its general obligation to Johnson. To construe the subject matter of this contract with Johnson, as outside its business, would be to reduce the scope of its undertaking as a principal contractor.

A case which is squarely in point is *Adamson vs. Oakland Construction Company*, 508 P. 2d 805 (Utah, 1973). The Utah

statute which corresponds to 21 V.S.A. §601 (3) requires that the work of an independent contractor be part of the process in the trade or business of the employer. A general contractor who was constructing a hospital entered into a subcontract with electrical contractors. The plaintiff's decedent, an employee of the subcontractor, was killed on the job. The court held that the general contractor was liable for Workmen's Compensation and immune from common law liability to the estate of the decedent. The court reasoned that the electrical installation is a part of the business of the general contractor Oakland.

One test used to determine whether the work of the independent contractor is part of the business of the principal employer is the control retained by the principal employer over the independent contractor. See *Blue Ridge Rural Electric Co. vs. Byrd,* 238 F. 2d 346 (4th Cir. 1956). Vermont Construction retained significant control over the work of Johnson. Johnson was required to follow the work schedule established by Vermont Construction. See Article III of the subcontract. Vermont Construction had the authority under Clause 21 F of the Contract with Northeastern Hospital to terminate the contract with any subcontractor who failed to follow any of the provisions of the general contract.

Another test used by the courts in resolving this question is whether the contract work is so necessary to the principal employer's business that save for the contractor, he would have to hire workmen to perform the task. See *Howard vs. Vulcan Materials Company,* 494 F. 2d 1183 (5th Cir. 1974). Because Vermont Construction had a contractual duty to Northeastern Hospital to paint the building, it would have had to hire its own workers to paint the building if it had not hired the subcontractor Johnson.

Finally, the Workmen's Compensation Act being remedial in purpose is applied liberally in favor of the injured workmen. *Herbert vs. Laymen,* 125 Vt. 481, 218 A. 2d 706 (1966). It is unfair to apply the statute liberally in favor of the injured workmen and then reverse this view and find no coverage when the employer invokes the section as a defense.

(C) The liability of Vermont Construction for Workmen's Compensation to the plaintiffs is primary.

In *Morrisseau vs. Legac,* 123 Vt. 70, 181 A. 2d 53 (1962) an injured employee of a subcontractor, sought Workmen's Compensation from both the subcontractor, the subcontractor's Workmen's Compensation insurer and the general contractor and the general contractor's insurer. The Commissioner of Workmen's Compensation ordered the insurer of the subcontractor to pay compensation to the workman and if he defaulted, the subcontractor's insurer to pay the compensation and if he defaulted, the general contractor's insurer to pay the compensation and if he defaulted, the general contractor to pay the compensation. The Supreme Court held that this order was in error because *the liability of all of these parties to the workman was primary.* The general contractor under Vermont law bears a continuing liability to the workman whether or not the subcontractor pays the compensation or carries Workmen's Compensation insurance. If the general contractor's liability under Vermont law were merely contingent on the failure of the subcontractor to pay compensation or carry insurance, the Commissioner's order in *Morrisseau vs. Legac* would have been correct.

21 V.S.A. § 601 (3) does not make the status of the principal employer contingent upon the independent contractor's ability to pay compensation or requiring the independent contractor to carry Workmen's Compensation insurance. In this

respect, Vermont's law is different from the statutes of many jurisdictions. Such a reading of 21 V.S.A. §601 (3) is strained and unconvincing. It is incorrect in light of *Morrisseau vs. Legac.*

(D) The liability of a person for Workmen's Compensation who is an employer under 21 V.S.A. §601 (3) does not depend on the existence of a contract of hire between such an employer and his injured workman.

Judge Holden stated in his order of September 30, 1976 that Vermont Construction was not liable for Workmen's Compensation to the plaintiffs because there was not a contract of hire between the plaintiffs and Vermont Construction. The court relied on the case of *Mercier vs. Holmes,* 119 Vt. 368,125 A. 2d 790 (1956). In Mercier, the court held that an employer who borrowed an employee from another employer was not liable for Workmen's Compensation to the employee because there was not a contract of hire between them. The case does not involve the liability of a person who hires an independent contractor. The purpose of 21 V.S.A. §601 (3) is to impose the liability on a principal employer in the absence of a contract of hire. The purpose of the statute is to place the burden of paying compensation on the organizer of an enterprise so that both the general contractor and the subcontractor are subjected to the Act. See *Blue Ridge Electric Cooperative vs. Byrd, supra.*

(E) Because Vermont Construction is primarily liable for Workmen's Compensation to the plaintiffs, it should be immune from common law liability to them.

The Workmen's Compensation law provides that the remedies provided an employee by the law are exclusive of all the employees' remedies of common law, 21 V.S.A. §622.

since the plaintiffs could have sought Workmen's Compensation from Vermont Construction, §622 bars this common law action.

The liability of a general contractor to suits by an employee of the subcontractor has not been determined by the Vermont Supreme Court. The majority of cases have granted immunity to the general contractor where facts were present similar to those of this case. Larson has stated in his treatise on Workmen's Compensation law that,

> "Since a general contractor is thereby in effect made the employer for the purpose of a compensation statute, it is obvious that he should enjoy the regular immunity of an employer from third-party suits when the facts are such that he could be made liable for compensation and the great majority of cases have so held". Larson, Workmen's Compensation Law (Matthew Bender, 1975) §72.31, Page 14-47 and case is cited in Note 47.

In *Blue Ridge Rural Electric Company vs. Byrd*, 238 F. 2d 346 (4th Cir. 1956), the plaintiff was injured while working on a construction project of Blue Ridge. He was employed by a subcontractor, and after being injured, collected Workmen's Compensation from the subcontractor. Applying a statute like Vermont's, the court held that a third-party action by the employee against Blue Ridge was barred because Blue Ridge was liable for Workmen's Compensation to the employee.

The defense of immunity should not be barred because Johnson rather than Vermont Construction paid a Workmen's Compensation claim to Martin and Mousseau's estate. The general contractor's immunity from a lawsuit in negligence by the injured employee derives from his potential liability for Workmen's Compensation rather than from payment of Workmen's Compensation to the injured employee. *Burke vs. Cities Service Oil Company of Delaware*, 266 F 2d 433 (10th Cir.

1959); *Blue Ridge Rural Electric Company vs. Byrd*, 238 F 2d 346 (4th Cir. 1956); *Burris vs. J. Ray McDermott & Co.*, 116 F. Supp. 907 (D.C. W.D. La. 1953). The significant fact in these three cases is that the subcontractor had paid the employees Workmen's Compensation. *Burris at 909, Burke at 434, Blue Ridge at 347.* Nevertheless, the courts held that the employees could not sue their general contractor in negligence because of the general contractors being statutory employers and were liable for Workmen's Compensation. According to these three cases, the test is not whether the general contractor has paid Workmen's Compensation, but whether he is liable for Workmen's Compensation. In *Blue Ridge,* the employee received Workmen's Compensation from the construction company hired by Blue Ridge to build transmission lines. The employee brought suit against Blue Ridge on a negligence theory. The court rejected the argument advanced by the employee that the suit was not barred because the contractor and not Blue Ridge had paid Workmen's Compensation. *Blue Ridge at 354.* In rejecting this argument, the court relied on the following reasoning in *State, to the use of Hubert vs. Benjamin,* 154 Md. 159, 162-163, 140 A. 52, 54-55,

> "It may be said that there were two employers of the dead man. One was his immediate employer, the subcontractor, whose relation was founded in contract; and the second was his more remote statutory employer, the principal contractor, whose status, with the rights and liabilities growing thereout, was created and determined by law...
>
> "If the construction by the appellant prevail, the dependent may recover compensation of the subcontractor, and also damages at common law against the negligent principal contractor, who is thus taken out of the act by the dependent's choosing to file her claim against the subcontractor but who would remain within the act, if she should file her claim for compensation

> against the principal contractor. In short, the liability of the principal contractor would not be fixed and determined by law, but by the arbitrary exercise of the dependent's will. The result of this contention would be to impose upon the general contractor an onerous and dual liability for compensation or damages, at the election of the employees of a subcontractor, while limiting his liability to his own immediate workmen to compensation alone. This theory would deprive a class of employers within the act of their exemption from all liability save that of compensation, which is an essential part of the general legislative plan. A construction so antagonistic to the fundamental principles underlying the enactment will not be adopted. If an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary". *Blue Ridge* at 355.

There has been much controversy in the courts where the general contractor has not been liable on the facts of the case, *e.g.* where the subcontractor carried insurance and the statute limited the liability of the general contractor to situations where the subcontractor was uninsured. See *Thomas vs. Farnsworth Chambers Company,* 286 F. 2d 270 (10th Cir. 1960). This problem is not present here. All of these cases in which the general contractor's liability is secondary are distinguishable from the case at bar because Vermont Construction and Johnson are both primarily liable for Workmen's Compensation, even though Johnson was insured. *Morrisseau vs. Legac, supra.* If a general contractor has only secondary liability, he can protect himself from Workmen's Compensation liability by hiring only subcontractors who have Workmen's Compensation insurance. If the general contractor has primary liability, he has to bear the dual expense of Workmen's Compensation and general liability insurance. It is the intent and purpose of the act to protect him from this dual liability.

(F) Even if the liability of Vermont Construction to pay Workmen's Compensation is contingent on the failure of Johnson to secure compensation for its employees, Vermont Construction should still be immune from common law liability to the plaintiffs.

Judge Holden in his order denying Vermont Construction's Motion for Judgment Not Withstanding the Verdict dated September 30, 1976 reasoned that because the liability of Vermont Construction is only contingent on Johnson's failure to secure compensation, Vermont Construction should not be immune from common law liability. Such an interpretation of 21 V.S.A. §601 (3) is incorrect and Vermont Construction should receive immunity from common law liability even if its liability for Workmen's Compensation is only contingent.

Larson in his treatise on Workmen's Compensation explains the reason for giving the general contractor immunity in this situation:

> "The cases denying immunity to the general contractor whose subcontractor is insured proceed on the theory that the general contractor's status should be tested by his actual relation to the subcontractor's employee on the given facts and at the specific moment of the accident, not by his potential liability if, for example, the subcontractor failed to carry insurance. In one sense, this is rather harsh on the general contractor. The object of the "contractor-under" statutes is to give the general contractor an incentive to require subcontractors to carry insurance. But if the general contractor does conscientiously insist on this insurance, his reward, under these cases, is loss of exemption from third-party suit. A sounder result would seem to be the holding that the overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to

remove him from the category of "third-party." He is under a continuing potential liability; he has thus assumed a burden in exchange for which he might well be entitled to immunity from damage suits, regardless of whether on the facts of a particular case actual liability exists. This burden may also be translated into financial terms, as was done by the First Circuit when it pointed out that the general contractor, by insisting that the subcontractor carry compensation insurance, imposes a cost on the subcontractor which the subcontractor will pass on to the contractor in his charges under the subcontract." Larson's, Workmen's Compensation Law, Vol. 2A, (1976) §72.31, 14-55.

II

Johnson has a duty to indemnify Vermont Construction for the amount of the judgment against Vermont Construction because of an expressed indemnity clause in their contract and because of Johnson's breach of their contract.

Vermont Construction brought a third-party action against Johnson pursuant to Rule 14A of the Federal Rules of Civil Procedure. The court dismissed this action in an Order dated September 17, 1974. The court also denied defendant's post trial motion to vacate said order. The dismissal of this action was in error.

According to Wright & Miller, Federal Practice and Procedure Civil, §1446, 1971, (P. 246)

> "A third-party claim may be asserted under Rule 14A only when a third-party's liability is in some way dependent on the outcome of the main claim. . . it is irrelevant whether the basis of the third-party claim is indemnity, subrogation, contribution, express or implied warranty,

> or some other theory, but impleader is proper when a right to relief exists under the applicable substance of law."

Vermont law recognizes a right of indemnity between two parties where they have ventured into an express agreement to indemnify. *Spaulding vs. Oakes*, 42 Vt. 343 (1869). Article XI of the contract between Johnson and Vermont Construction contains the following express indemnification clause:

> "ARTICLE XI: The subcontractor undertakes expressly to pay all the damages that could be caused to the contractor as a result of defects in his work or as a result of his defaults to terminate according to the schedule that portion of the work mentioned in the present contract. These damages might be direct or indirect, they might result from the law in general or from the specific conditions of the contract between the contractor and the owner..."

The language found in Article XI is broad enough to be interpreted as an express indemnity clause which requires Johnson to indemnify Vermont Construction on account of any performance in the subcontract which gives rise to damages either directly or indirectly from the law in general or from any of the specific conditions of the contract between Vermont Construction and Northeastern Hospital. The language "defects in work" is broad enough to include both defects in the manner in which the work was done and defects in the workmanship.

Secondly, Johnson agreed for a valuable consideration with Vermont Construction:

1. That they would execute all of the work under the superintendence of a qualified foreman (Article II).

2. That it would provide all the necessary equipment for completion of its work.

3. That all of the general conditions and specifications of the contract between Vermont Construction and Northeastern Hospital became a part of the contract between Vermont Construction and Johnson.

4. That all of the work in the performance of the subcontract would be in compliance with all applicable federal, state and local laws, rules and regulations thereof (Article XVII).

The evidence introduced at trial showed that Johnson supplied all the equipment and materials for the scaffolding. At the time the scaffold was erected, and the men ascended immediately prior to their fall, no foreman of Johnson was present. *This is a breach of Article II of the contract.* The evidence at the trial showed that the scaffolding was not tested in accordance with the Manual of Accident Prevention nor applicable safety harnesses and apparatus used as specified in the manual. *These are breaches of the contract by Johnson which give rise to a cause of action in contract against it by the other party to the contract, Vermont Construction. American Employer's Ins. Co. of Boston v. Brandt Masonry Corp.*, 252 App. Div. 506, 299 NYS 984, 987 (1937).

Assuming Vermont Construction had a duty with regard to conditions of the premises, it made a contract with Johnson to perform this duty and Johnson performed this duty negligently. As a result, Vermont Construction was held liable to the plaintiffs. Vermont Construction is entitled to restitution from Johnson for this damage.

In *Read vs. The United States,* 201 F 2d 758 (3rd Cir. 1953), the United States made a contract with Pioneer to repair a ship. The contract required Pioneer to provide safe lighting on the ship. An employee of Pioneer suffered injuries from a fall as a result of unsafe lighting. The employee sued the

United States which impleaded Pioneer. The court held that Pioneer breached its contractual duty to the United States to provide safe lighting. It was liable for the amount of damages awarded against the United States. This liability did not depend on any contractual provision for express indemnity. The court said,

> "The fundamental theory is that where a person has a non-delegable duty with respect to the conditions of his premises, but has made a contract with another to perform that duty and the other performs it negligently so as to make the owner liable to a person later injured, then as a matter of implied contract, the owner is entitled to restitution from the other for reasonable damages". 201 F. 2d at 763

The rule prohibiting contribution amont joint tortfeasors expressed in *Spaulding vs. Oakes,* 42 Vt. 343 (1869), is not involved here as is amply demonstrated by the reasoning in *Birchall vs. Clemons Realty Co.,* 241 App. Div. 286, 271 NYS 547, 549 (1934). In that case, the court quoted the following language with approval:

> "Here there is no question of contribution, but of indemnity.
>
> . . . where one of the two parties is guilty of the original affirmative act of negligence which caused the injury, and the other is held liable for a failure in some subsequent and different duty, then such other may have an action for indemnity against the one whose original negligent act caused the injury." 271 NYS 547, at pages 549-550.

Vermont Construction is entitled to rely upon its contract with Johnson and receive an adequate and full performance or sue for damages under the principle expressed in *Read vs. The United States, supra; American Employer's Insurance Co. of Boston vs. Brandt Masonry Corp., supra.*

Vermont law has never held that one who is entitled to expect a certain quality of performance under a contract forfeits those rights if he is liable to a third-person in negligence.

An analogy can be made with the case of *Digregorio vs. Champlain Valley Fruit Company,* 127 Vt. 562, 255 A 2d 183 (1969). In *Digregorio,* a person was injured when she ate a banana which contained a piece of metal. The injured person settled with the retailer and the wholesaler and received money from each. The retailer sued the wholesaler for the amount of its contribution to the settlement.

The court held that the retailer's right of indemnification against the wholesaler was based on breach of warranty. The court refused to apply the joint tort-feasor rule against indemnification even though both parties owed duties to the injured person. The court said the rule did not apply because the parties were not wrongdoers who violated equivalent duties but rather were successive wrongdoers. The parties were not in equal fault because the retailer was entitled to rely on the wholesaler's warranty. Because the retailer's fault was secondary to the initial negligence of the wholesaler, it had a right to restitution.

The same reasoning applies to this case. Assuming that both Vermont Construction and Johnson owed duties to the plaintiff, they did not violate equivalent duties, but successive duties. The parties were not in equal fault because Vermont Construction was entitled to rely on its contract with Johnson just as the retailer was entitled to rely on the wholesaler's warranty. The retailer's only wrong was not discovering the metal in the fruit; Vermont Construction's only wrong was in not ascertaining that Johnson did not follow the safety procedures required. Vermont's negligence, if there was any, which we do not concede, was secondary to the initial

negligence of Johnson and therefore Vermont Construction has a right to restitution from Johnson.

Johnson is liable to Vermont Construction regardless of the fact that it has paid Workmen's Compensation benefits to the plaintiff. 21 V.S.A. §622 provides that the Workmen's Compensation benefits is the employees exclusive remedy against his employer. However the section in no way limits the employer's liability to a third-party for a breach of independent contractual agreements. The court in *New England Telephone and Telegraph Company vs. C.V.P.S.*, 391 F. Supp. 420 (D. Vt. 1975) discussed the exclusivity provision of the Vermont statute and adopted the view set forth in Larson's Workmen's Compensation Law, §76.10, that the section does not protect an employer who has paid compensation benefits from contractual claims for indemnification by third-party. This is so because the third-party action for indemnification is "on account" an independent contractual duty owed by the employer to third-party.

III

The Plaintiffs by using the scaffold without securing themselves to safety lines assumed the risk of injury as a matter of law.

The Vermont Supreme Court has defined the doctrine of assumption of risk as follows:

> "One cannot assume a risk unless one knows about it, appreciates it and consents to assume it. It is only when one knowing and comprehending the danger voluntarily exposes himself to it, even though not negligent in so doing, is he deemed to have assumed the risk from an injury resulting therefrom". *Garafano vs. Neshobe Beach Club,* 126 Vt. 566 (1967)

Assumption of the Risk is a matter of law, when the facts are undisputed and so plain that differing conclusions cannot be drawn from them. *Fore v. Vermeer,* 287 N.E. 2d 526.

The facts in this case are undisputed that the plaintiffs knowing of the serious risk of injury, ascended 40 feet on a scaffold without securing safety lines to their bodies. These facts establish that the plaintiffs assumed the risk of injury as a matter of law.

The plaintiffs both appreciated the dangers of ascending a scaffold without securing safety lines to their bodies. The plaintiff Alvin Martin had worked as a painter for Johnson for five years, about 50% of the time from a scaffold (T-147, 1-4; T-10). The plaintiff Mousseau had also worked for several years for Johnson as a painter, and was at one time a foreman. Both men knew how to rig a scaffolding (T-148, 9; T-268). Martin realized that if he failed to secure a safety line to his body and fell 30 feet he could be seriously injured (T-149, 7-10).

The two men spent five and one-half hours rigging the scaffold (T-188, 2). They tied two safety lines to an independent point of suspension on the roof from the lines from which the scaffold was suspended (T-192). One line was for Martin, one line was for Mousseau (T-272). Martin did this so that if something should happen to the scaffold, there would be an independent line to prevent him from falling (T-192; T-315). Martin then ascended 32 feet on the scaffold (T-180) without securing the safety line to his body (T-175).

Although Martin realized the practice was dangerous, he did not secure his body to the safety line because it was too inconvenient to tie and untie the safety lines every five feet as they raised the scaffold higher (T-176). These men took a gamble that they could avoid injury without securing their

bodies to the safety lines and they lost the gamble. Such a willingness to risk injury constitutes assumption of the risk. The very testimony of plaintiff Martin clearly demonstrates that they knew, appreciated and consented to the risk of injury in failing to tie the safety line to their bodies:

"Q. Sure, you knew all about the use of safety ropes?

A. As much as I have seen, yes.

Q. Well, you knew what a safety rope is for, don't you?

A. Yes.

Q. You know that if you fall from a height of 20 feet, you could very well hurt yourself and seriously?

A. True.

Q. Yah, you went up on that scaffolding without your safety rope upon you, you well knew if you fell from that height, you would be seriously injured, isn't that true?

A. We had on safety lines but didn't get a chance to put our hands on them.

Q. What I mean is, you knew without being attached to your safety lines, as you progressed up the building to say a height of 20 feet up or so, if you had fallen from that height you would have seriously injured yourself, you knew that, didn't you? (T-148)

* * *

A. Well if you are pulling yourself up you are using both of your hands and you haven't got a chance to tie yourself off unless you stop the staging in the middle and tie it to you, you go up 2 or 3 feet then you untie the rope and tie it again as you go up 2 or 3 feet.

Q. You knew if you were up 20 feet high without the safety rope attached to you and you fell you would hurt yourself, didn't you?

A. Yes.

Q. But you felt that it was inconvenient to tie the safety rope on every few feet, isn't that true?

A. I never did it before.

Q. But yet you well knew if you didn't do it, if you didn't tie it and you fell, you would get seriously hurt?
A. Yes." (T-149)

The testimony of Martin demonstrates a history of a callous attitude of care toward their own safety—a pattern of unequivical assumption of the risk of long standing:

"Q. Now a, I believe you testified the other day that the week before this accident you painted a steeple at Dannemora, New York?
A. I believe it was the week before that, yes.
Q. All right, you said the steeple, if my recollection was correct, was about 75 to 80 feet high?
A. Yes.
Q. How were you suspended 75 or 80 in order to paint that steeple?
A. About like—well, Boatswain's chair.
Q. I'm sorry.
A. Like a swing seat.
Q. Does that mean a little platform you sit on?
A. Yes.
Q. It has a rope that holds it up?
A. Well yes, it has one rope but you have a pulley the same way as when you use here, you only have one.
Q. All right you pull the rope and, on the pulley, and it pulls you up or lets you down, whatever you want to do, is that right? (T-222)
A. Yes.
Q. What was the size of the rope on the Boatswain's chair?
A. Three-quarter inch.
Q. Just like the one on this job?
A. Yes (T-223).
Q. *All right now tell the Jury if you would, what precautions you took in the event that that rope that was holding you 75 to 80 feet in the air should fail?*
A. *None.*
Q. Was that your usual habit to use a Boatswain's chair just rely on that one rope alone?

A. Yes.

Q. All right now, how about when you painted those grain elevators for AGWAY in St. Albans? I believe you told the Jury you were a hundred feet in the air clear to the top of these grain elevators, how were you suspended in order to be that high off the ground?

A. The same way.

Q. With a Boatswain's chair?

A. No, with a swinging staging.

Q. Swinging staging just like the staging that was used on the hospital?

A. Yes.

Q. All right now tell the Jury what precautions you took for your own safety in the event that something should happen to that swing staging while you were a hundred feet in the air? (T-223)

A. We hook our safety lines same as we do on this job.

Q. And did you tie those safety lines around you?

A. No.

Q. You just let them hang next to the building?

A. Yes.

Q. So that meant that if anything should happen to that swing staging, the only thing that would save you from serious injury or from perhaps death, would be being able to grab on to one of those lines, is that fair? (T-224)

A. If you are already up there you tie yourself off, you hang on that rope.

Q. Did you tie yourself off when you got up there?

A. Yes.

Q. You did tie yourself off in St. Albans?

A. Yes.

Q. In other words you tied that safety line around your body?

A. No.

Q. What you tied off was the rope on the staging, is that right?

A. Right.

Q. All right now I say supposing something should happen to that staging either the rope breaks or the boards that are holding it on the top give way, the only chance you had to avoid very serious injury or even your death, would be to grab hold and try to catch the lifeline before you fell out of that chair, is that fair? (T-224)

A. You already had your hand on it when you tie yourself off, the first thing you do is grab that rope.

Q. All right then you hold that rope all the time, do you?

A. Yes.

Q. Every time you go along that stage you never let go of that rope, is that right?

A. Yes.

Q. Why do you hold the rope?

A. Helps to steady yourself, the swing going back and forth.

Q. All right and why do you hold it? You hold it because that is the only means you have to protect yourself from serious injury or even death, is that right? (T-225)

A. Yes and to steady yourself.

Q. And you knew that at the time?

A. Yah, I know that.

Q. *And you knew that at the time of this accident that the only thing that could save you from serious injury or even death would be to hold on to that life line?*

A. *Yes.*

Q. *And if you had that lifeline tied around you, even if you let go of it with your hand, it would still hold your body, is that right?*

A. *Yes.*" (T-225)

IV

The general contractor owes no duty to the employees of a subcontractor over which the general contractor does not exercise control to provide a safe place to work.

Vermont Construction did not participate in the erection of the scaffold from which the two plaintiffs fell nor furnished any materials in the erection of the scaffold. No employee of Vermont Construction undertook to direct the manner in which the scaffold would be constructed. There is no evidence that Vermont Construction had actual knowledge that the scaffold was erected in a dangerous manner. All of the materials for the scaffold were provided by Johnson. The scaffold itself was erected by the plaintiffs.

There is no evidence that Vermont Construction maintained any control over the scaffold. The only control retained by Vermont Construction over Johnson was to require Johnson to follow its work schedules (Article III). There is no evidence that Vermont Construction retained the authority to direct Johnson how to erect the scaffold.

In the absence of such control, Johnson as the employer of the plaintiffs owed the duty of seeing that the scaffold was erected in a safe manner.

In *Johnson vs. Calwest Construction Co.*, 22 Cal. Rptr. 492 (Dist. Court of Appeals 1962), the general contractor was constructing an apartment building. The plastering work was done by a subcontractor and an employee of the subcontractor was injured when he fell from a scaffold. The general contractor did not construct the scaffold or direct its construction. He did not retain any control over the scaffold and he had no knowledge that the scaffold was erected in a dangerous manner. Under these circumstances, the court held

that the general contractor had no duty to the employees of the subcontractor to provide them with safe conditions of work. The court rejected the contention that the duties of the general contractor and the subcontractor were equivalent.

Vermont Construction did assume certain obligations to the Northeastern Hospital to follow certain procedures to assure safety on the construction site, but these obligations did not create any duties on the part of Vermont Construction Company running to the employees of the subcontractor. Vermont Construction owed these duties only to the Northeastern Hospital. The employees of the subcontractor were not third-party beneficiaries of the contract between Vermont Construction and the Northeastern Hospital.

In *West vs. Mousseau Knudsen Company,* 294 F. Supp. 1336 (D. Mont. 1969), the general contractor entered into a contract with the United States. The contract provided that the general contractor should inspect the work site for unsafe conditions. The plaintiff, an employee of the subcontractor was injured when he slipped on oil which leaked on to a trailer bed. The plaintiff sued the general contractor. The court held that the general contractor had no contractual duty to the injured workman to see that the truck bed was maintained in a safe condition because the workman was not a third-party beneficiary of the contract.

Vermont Construction made a motion for a directed verdict on the ground that it did not owe any duty to the employees of the subcontractor. The denial of this motion constituted an error.

Similarly the instructions of Judge Holden to the jury on Page 946 of the transcript are in error:

> "You may also consider the general conditions of the contract for the construction of Project 1355 at St. Johnsbury . . .

It is also proper for you to consider the general conditions of the construction contract concerning supervision to be provided by the general contractor to all undertakings by the main contractor and the subcontractor."

V

Because both the general contractor and the subcontractor were negligent, the general contractor is entitled to a *pro tanto* reduction of the judgment entered against him in favor of the employees of the subcontractor in the amount of Workmen's Compensation paid by the subcontractor to his employees.

Any negligent act by Vermont Construction in failing to supervise the erection of the scaffold would also constitute a negligent act on the part of Johnson, the subcontractor who contracted to erect the scaffold as a necessary and incidental part of performing its subcontract. Because Johnson paid Workmen's Compensation benefits to the plaintiffs, it claims that it is entitled to reimbursement for the amount of this compensation from the judgment against Vermont Construction Company under 21 V.S.A. § 624. This is manifestly unjust because Johnson was negligent as well as any negligence that could be attributed to Vermont Construction, and therefore Johnson should not be entitled to reimbursement under 21 V.S.A. § 624 under the general principle that one should not profit from his own wrong; therefore, the judgment should be reduced to the extent of the Workmen's Compensation payable by Johnson to the plaintiffs.

The Vermont Supreme Court has not decided this question. In *Dubie vs. Cass-Warner Corp.*, 125 Vt. 476 (1966), the court held that an employee was not required to plead that he had received Workmen's Compensation in his complaint against a

third-party tort-feasor. The court said, "the wrongdoer is not entitled to credit for compensation payments from an outside source against the damages he brought about". The issue in that case was whether the change in the Workmen's Compensation Law which permitted the employee to sue a third-party tort-feasor affected the former rule that a plaintiff had to plead whether he had received Workmen's Compensation. The statement quoted was merely dictum. Furthermore, the dictum was based on the rule that a tort-feasor's liability is not reduced by payments the plaintiff receives for damages he has had. This rule should not apply because Johnson has also been negligent and will be reimbursed for its Workmen's Compensation payments unless the judgment is reduced. This case does not require the Federal Court to rule that a negligent employer is entitled to reimbursement as the holding in *New England Telephone & Telegraph Co. vs. C.V.P.S.*, 391 F. Supp. 420 (D.C., Vt. 1975) demonstrates.

In *New England Telephone & Telegraph Co.* a lineman employed by C.V.P.S. was injured and received Workmen's Compensation from C.V.P.S. The telephone company settled with the workman and brought an indemnity action against C.V.P.S. The court dismissed the counterclaim filed by C.V.P.S. seeking a reduction in any indemnity award for Workmen's Compensation it had paid. The court found that C.V.P.S. was negligent and that its negligence barred recovery under 21 V.S.A. § 624. The court relied on *Essick vs. City of Lexington*, 233 N.C. 600, 65 S.E. 2d 220 (1951) and *Witt vs. Jackson*, 57 Cal. 2d 57, 17 Cal. Rptr. 369 (1961) and the principle that a wrongdoer should not profit from his wrong. Although the procedural posture of this case is different, the *New England Telephone & Telegraph* case establishes the principle in this jurisdiction that negligent employer should not be reimbursed by a third-party tort-feasor for Workmen's Com-

pensation it has paid. It would be inconsistent with that case to hold that a judgment against a third-party tort-feasor should not be reduced to the extent that Workmen's Compensation has been paid by the negligent employer.

The two cases which the Vermont Federal Court relied on in *New England Telephone, Essick, supra* and *Witt, supra,* both held, applying Workmen's Compensation Law with provisions similar to 21 V.S.A. § 624, that a negligent employer was not entitled to reimbursement by a third-party tort-feasor of compensation payments and that the third-party tort-feasor of compensation payments and that the third-party tort-feasor was entitled to a reduction in damages by the amounts of Workmen's Compensation paid. This rule is well established in North Carolina and California. *Brown vs. Southern Railway Company,* 204 N.C. 668, 169 S.E. 419 (1933); *Lovette vs. Lloyd,* 236 N.C. 663, 73 S.E. 2d 886 (1953); *Hunsucker vs. High Point Vending & Chair Company,* 237 N.C. 559, 55 S. E. 2d 768 (1953); *Row vs. Workmen's Compensation Appeals Board,* 12 Cal. 3d 8841, 17 Cal. Rptr. 683, 528 P. 2d 771, 1974; *Gregory vs. Workmen's Compensation Board,* 12 Cal. 899, 117 Cal. Rptr. 694, 1974.

The rule in Pennsylvania is also that a negligent employer cannot be reimbursed from judgments against third-party tort-feasors for Workmen's Compensation payments but Pennsylvania accomplishes this result by limiting the third-party tort-feasor's right of contribution to the limit of the compensation payments. *Maio vs. Fahs,* 339 Pa. 180, 14 A 2d 105, 1940; *Brown vs. Dickey,* 397 Pa. 454, 155 A. 2d 836, 1959.

The rule of these jurisdictions also applies to the employers carrier, subrogated to the rights of the employer. See *Lovette vs. Lloyd, supra; Essick vs. City of Lexington, supra* and if either the employer or the employee sues the third-party tort-

feasor, *Witt vs. Jackson, supra; Brown vs. Southern Railway, supra; Essick, supra.* In Pennsylvania and California, the employer cannot be reimbursed whether he is vicariously liable through *respondeat superior* or negligent. *Witt vs. Jackson, supra; Maio vs. Fahs, supra.* In North Carolina, the rule only applies if the employer has been negligent.

Numerous jurisdictions hold, to the contrary, that the concurrent negligence of an employer is not a defense to actions against third-party tort-feasors. *Schweizer v. Elox Division of Colt Industries,* 336 A. 2d 73 and cases cited therein at 78. The reasoning of these courts is that the employer is subrogated to the employee's rights so that the employer's negligence is not relevant and that the Workmen's Compensation Act does not preclude reimbursement to a negligent employer.

By holding that the reimbursement provision of 21 V.S.A. § 624 does not apply to a negligent employer, the court would not be legislating a new section. The purpose of this provision was to prevent double recovery by the employee and to prevent the employer from bearing the burden of the loss when another person was at fault. The purpose was not to shield a negligent employer from paying damages. If the negligent employer is reimbursed, then a common law principle that no man shall profit by his own wrong is violated. Statutes in derogation of the common law should be strictly construed. Therefore, unless the statute specifies the negligent employer should be reimbursed, it should not be so construed.

The employer should not be entitled to take advantage of his negligence because he is subrogated to the rights of his employee. The doctrine of subrogation is not to be applied in aid of a wrongdoer. *Iby vs. Wrisley,* 158 A. 67, 104 Vt. 148.

North Carolina, California and Pennsylvania have recognized this principle in their rules on this issue.

Vermont does not permit contribution between joint tort-feasors. *Howard vs. Spafford*, 132 Vt. 434, 321 A. 2d 74 (1974). However, Vermont Construction is not trying to hold Johnson liable as a joint tort-feasor. It is only asserting it should not be reimbursed since it is also a negligent party.

The first reason for the rule asserted is that Johnson should not be able to profit by its own wrong and be able to avoid any payments to a workman whose injury it bears the partial responsibility for. *Brown vs. Southern Railway, supra.* The second reason for the rule is that it is unfair for Vermont Construction to bear the total burden of the plaintiffs' loss when both Vermont Construction and Johnson have been negligent. This rationale underlies the rule in North Carolina, Pennsylvania and California.

It has been held that this defense can be maintained even though the employer has not intervened in or been made a party to the employee's action. *Tate v. Superior Court*, 213 Cal. App. 2d 238, 28 Cal. Rptr. 548 (1963).

Conclusion

The court erred when it dismissed the defendant's third-party action against Johnson Industrial Painting Contractors; the defendant's motion for a directed verdict and its motion for judgment notwithstanding the verdict, should have been granted.

THEREFORE, judgment for the plaintiff should be reversed and judgment entered here for the defendant, Vermont Construction Company; or in the alternative, the cause

should be remanded for further proceedings on the defendant's third-party complaint against Johnson Industrial Painting Contractors.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

Nos. 74-99, 73-240

RE: Daniel E. Ryan, etc. et al
vs
New Bedford Cordage

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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Leslie R. Johnson

Sworn to before me this
18th day of February, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77